Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 22-32-1989
PS GILL J
23 MAY 1992

Contract *— Agreement for sale and purchase of land — 10% forfeitable deposit paid — Oral promise by defendants for obtaining loan or joint venture — Denial by defendants — Whether time the essence of contract — Negotiations — Instant termination of agreement — Whether reasonable and valid*

Equity *— Waiver — Specific performance — Whether defendants may be allowed to enforce their strict legal rights — Whether plaintiffs entitled to specific performance*

Evidence *— Admissibility — Pre-contract oral promise for obtaining loan or joint venture — Whether admissible and enforceable*

Evidence *— Adverse inference — Failure to call witnesses — Whether adverse inference applies — Principles applicable — Evidence Act 1950 s 114(g)*

Contract *— Damages — Breach of oral undertaking for obtaining loan or joint venture — Wrongful termination of contract — Damages to be paid by parties in breach — Damages to be assessed*

The plaintiffs, a company with a paid-up capital of $5m, under a written agreement of sale and purchase dated 20 August 1984 ('the said agreement') purchased a piece of land measuring 1,000.5 acres in the District of Johore Bahru ('the said land') for $47,939,958 from its registered proprietors the second defendant, Rumah Nanas Rubber Estate Sdn Bhd. The first defendant was the chairman of the board of directors of the second defendant. The plaintiffs were required on execution of the said agreement to pay 10% of the purchase price by way of forfeitable deposit amounting to $4,793,995.80. The balance of the purchase price was to be paid within six months from the date of execution, with provisions for extension of time for completion. The second defendant granted several extensions for completion to the plaintiffs as requested. On 12 December 1988, after some three and a half years, the solicitors for the second defendant wrote to the plaintiffs informing them that the second defendant was terminating forthwith the said agreement on the ground that the plaintiffs were unable to complete the purchase of the said land. On 18 December 1988, the plaintiffs entered a caveat against the said land, and subsequently filed the present action.

The plaintiffs' managing director (PW1) testified that through the help of a mutual friend he spoke on the telephone with the first defendant who promised that he and the second defendant would obtain a loan to enable the plaintiffs to pay the balance of the purchase price, failing which the second defendant would enter into a joint

A venture with the plaintiffs to develop the said land. As told by the first defendant, PW1 saw the first defendant's solicitor Mr AL Looi (since deceased) in Johore Bahru regarding the sale of the said land. The solicitor told the plaintiffs that it was not necessary to include in the agreement the oral undertaking by the defendants to obtain the loan as the first defendant was a big tycoon and the plaintiffs should trust B him. Acting on such assurance and in reliance on the oral undertaking of the first defendant, the plaintiffs entered into the said agreement. The plaintiffs contend that the instant termination of the said agreement was invalid as time was no longer of the essence of the contract. They contend that they had been negotiating with Sohaimi, the C resident director of the second defendant for joint venture, and Sohaimi had assured that the defendants would not terminate the said agreement and forfeit the deposit. The plaintiffs further contend that they had arrived at a compromised arrangement on joint venture with Sohaimi who was representing both the defendants. The plaintiffs claim specific performance of the said agreement, damages and costs.

D At trial, the first defendant denied having given the oral undertaking for the loan or joint venture. The executive director of the second defendant admitted that Sohaimi was authorized to negotiate with PW1. The defendants contend that the oral undertaking was inadmissible and irrelevant and that adverse inference should be drawn against E the plaintiffs for failing to call the mutual friend who introduced the first defendant and the director of the plaintiffs as witnesses. The defendants further contend that the said agreement had been validly terminated.

Held, allowing the plaintiffs' claims:

F (1) On the evidence both oral and on the contemporaneous documentary evidence, the court found that the plaintiffs had proven on a balance of probabilities that the defendants had promised to secure a loan for the plaintiffs and that in the event that such a loan could not be secured, the second defendant would join the G plaintiffs in a joint venture scheme to develop the said land. The court found the first defendant to be an evasive and unreliable witness.

(2) As time was no longer of the essence of the contract, the notice of termination dated 12 December 1988 was not a reasonable notice. The said agreement was never legally terminated and ac- H cordingly the plaintiffs were not in breach of the agreement.

(3) The defendants by their indulgence in granting the plaintiffs a series of extensions for completion had lulled them into a false sense of security and had given them reason to believe that they would be given a reasonable time within which to complete the I contract. It would be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce their strict legal rights against the plaintiffs after they have led the plaintiffs to believe that they had no intention to enforce such rights.

(4) On the evidence viewed in totality the court was satisfied that the plaintiffs had made out a case to merit an order for specific performance. A court of equity enforces specific performance of a contract affecting land because it acts upon the equities caused by the acts of the parties in the execution of the contract and not upon the contract itself.

(5) The plaintiffs were entitled to an order for specific performance of the said agreement with damages to be assessed and paid by the second defendant to the plaintiffs for wrongful termination of the said agreement and by both defendants for breaches of their undertakings with costs.

(6) The primary purpose of proving the pre-contract statements in this case was not to contradict, vary, add to or subtract from the terms of the agreement but to prove the existence of a separate contractual provision. Such oral terms were therefore admissible in evidence.

(7) There was clearly no question of an attempt by the plaintiffs either to withhold or suppress evidence. There was therefore no justification whatsoever for drawing an adverse inference against the plaintiffs under s 114(g) of the Evidence Act 1950 for failure to call the two witnesses mentioned.

(8) An adverse inference ought to be drawn against the defendants in that had their resident director Sohaimi been called to give evidence, his evidence would have been unfavourable to them. The court found Sohaimi to be the only person who could give a firsthand account of the negotiations between the plaintiffs and the defendants and the only one who could deny on oath the allegations made by the plaintiffs.

[Bahasa Malaysia summary

Plaintif, sebuah syarikat dengan modal dibayar sebanyak $5 juta, di bawah satu perjanjian jual-beli bertulis bertarikh 20 Ogos 1984 ('perjanjian itu') telah membeli sebidang tanah yang berukuran 1,000.5 ekar dalam Daerah Johor Bahru ('tanah itu') untuk jumlah $47,939,958 daripada tuanpunya berdaftarnya, iaitu defendan kedua, Rumah Nanas Rubber Estate Sdn Bhd. Defendan pertama adalah pengerusi lembaga pengarah defendan kedua. Plaintif diwajibkan pada pelaksanaan perjanjian itu membayar 10% harga pembelian melalui wang cengkeram yang boleh dilucuthak sejumlah $4,793,995.80. Baki harga pembelian itu harus dibayar dalam tempoh enam bulan dari tarikh pelaksanaan, dengan peruntukan untuk lanjutan masa untuk penyelesaian. Defendan kedua telah memberikan beberapa lanjutan bagi penyelesaian kepada plaintif seperti yang dipohon. Pada 12 Disember 1988, selepas kira-kira tiga setengah tahun, peguam bagi defendan kedua telah menulis kepada plaintif untuk memberitahu mereka bahawa defendan kedua ingin menamatkan dengan serta-merta perjanjian itu atas alasan bahawa plaintif telah gagal menyelesaikan pembelian tanah itu. Pada 18 Disember 1988, plaintif telah memasukkan satu kaveat terhadap tanah itu, dan kemudiannya telah memfailkan tindakan ini.

A Pengarah urusan plaintif (PWI) telah memberi testimoni bahawa melalui bantuan seorang sahabat bersama beliau telah bercakap melalui telefon dengan defendan pertama yang berjanji bahawa beliau dan defendan kedua akan memperolehi satu pinjaman untuk membolehkan plaintif membayar baki jumlah harga pembelian, kalau tidak berjaya defendan kedua akan memasuki satu usaha sama dengan plaintif B untuk memajukan tanah itu. Seperti diberitahu oleh defendan pertama, PWI telah berjumpa peguam defendan pertama, Encik AL Looi (yang sekarang telah meninggal dunia), di Johor Bahru berkenaan dengan jualan tanah tersebut. Peguam itu memberitahu plaintif bahawa tidaklah wajib memasukkan di dalam perjanjian itu akujanji lisan C defendan untuk memperolehi pinjaman kerana defendan pertama adalah seorang jutawan dan plaintif patut mempercayainya. Bertindak atas jaminan sedemikian dan bergantung atas akujanji lisan defendan pertama, plaintif telah memasuki perjanjian itu. Plaintif mendakwa bahawa penamatan perjanjian itu sekarang adalah tidak sah kerana masa tidak lagi menjadi intisari kontrak itu. Mereka mendakwa bahawa D mereka telah berunding dengan Sohaimi, pengarah residen defendan kedua bagi usaha sama, dan Sohaimi telah menyakinkan bahawa defendan tidak akan menamatkan perjanjian tersebut dan melucuthak wang cengkeram. Plaintif seterusnya mendakwa bahawa mereka telah mencapai satu persetujuan kompromi atas usaha sama itu dengan E Sohaimi yang mewakili kedua-dua defendan. Plaintif menuntut pelaksanaan spesifik perjanjian itu, ganti rugi dan kos.

Di perbicaraan, defendan pertama menafikan yang ia telah memberikan akujanji lisan untuk pinjaman atau usaha sama. Pengarah eksekutif defendan kedua mengaku bahawa Sohaimi telah diberi kuasa untuk berunding dengan PWI. Defendan mendakwa bahawa akujanji F lisan itu tidak boleh diterima dan tidak relevan dan bahawa inferens buruk harus diambil terhadap plaintif kerana gagal memanggil sahabat bersama itu, yang telah memperkenalkan defendan pertama, dan pengarah plaintif sebagai saksi. Defendan selanjutnya mendakwa bahawa perjanjian itu telah ditamatkan secara sah.

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Diputuskan, membenarkan tuntutan plaintif itu:

(1) Atas keterangan, kedua-dua lisan dan keterangan dokumentari semasa, mahkamah mendapati bahawa plaintif telah membuktikan atas imbangan kebarangkalian bahawa defendan telah berjanji mendapatkan satu pinjaman untuk plaintif dan bahawa jika pin- H jaman sedemikian tidak boleh diperolehi, defendan kedua akan menyertai plaintif dalam satu usaha sama untuk memajukan tanah itu. Mahkamah mendapati bahawa defendan pertama adalah seorang saksi yang suka berdalih dan mahkamah tidak boleh bergantung kepadanya.

I (2) Oleh kerana masa tidak lagi menjadi intisari kontrak itu, notis penamatan yang bertarikh 12 Disember 1988 bukanlah notis yang munasabah. Perjanjian itu tidak sekali-kali ditamatkan secara sah di sisi undang-undang dan lantaran itu plaintif tidak mengingkari perjanjian.

(3) Defendan dengan menurut kemahuan plaintif dan memberikan plaintif beberapa lanjutan masa untuk penyelesaian telah menggoda mereka ke dalam satu perasaan selamat yang palsu dan telah memberikan mereka sebab untuk mempercayai bahawa mereka akan dibenarkan masa yang munasabah untuk menyelesaikan perjanjian itu. Tidaklah saksama, memandangkan urusan yang telah berlaku di antara pihak-pihak itu, untuk membenarkan defendan menguatkuasakan hak tegas mereka di sisi undang-undang terhadap plaintif setelah mereka menyebabkan plaintif mempercayai bahawa mereka tidak bertujuan menguatkuasakan hak sedemikian.

(4) Atas keseluruhan keterangan, mahkamah berpuas hati bahawa plaintif telah membina satu kes yang harus diberi pelaksanaan spesifik. Satu mahkamah ekuiti menguatkuasakan pelaksanaan spesifik satu kontrak berkenaan tanah kerana ia bertindak atas ekuiti yang disebabkan oleh tindakan setiap pihak dalam mengikat kontrak itu dan bukan atas kontrak itu sendiri.

(5) Plaintif berhak mendapat satu perintah pelaksanaan spesifik perjanjian itu dengan ganti rugi yang akan ditaksir dan dibayar oleh defendan kedua kepada plaintif untuk penamatan salah perjanjian itu dan oleh kedua-dua defendan untuk keingkaran akujanji mereka dengan kos.

(6) Tujuan utama membuktikan nyataan sebelum kontrak di dalam kes ini bukanlah untuk menyangkal, mengubah, menambah atau menolak daripada terma perjanjian itu, tetapi untuk membuktikan kewujudan satu peruntukan kontrak yang berasingan. Terma lisan sedemikian oleh itu boleh diterima sebagai keterangan.

(7) Jelas sekali tidak ada percubaan oleh plaintif sama ada untuk memegang balik atau untuk menyekat keterangan. Jadi tidak ada alasan sama sekali untuk mengambil inferens buruk terhadap plaintif di bawah s 114(g) Akta Keterangan 1950 kerana gagal memanggil dua orang saksi yang dikatakan itu. Suatu inferens buruk harus diambil terhadap defendan kerana jika pengarah residen mereka, Sohaimi, telah dipanggil untuk memberi keterangan, keterangannya mungkin tidak memihak kepada defendan. Mahkamah mendapati bahawa Sohaimi adalah orang yang tunggal yang boleh memberi gambaran pertama tentang rundingan di antara plaintif dan defendan dan orang yang tunggal yang boleh menafikan atas sumpah dakwaan yang dibuat oleh plaintif.]

[*Editorial Note*: The defendants have appealed to the Supreme Court. The learned judge has granted a stay of his order pending appeal.]

Cases referred to

1 *Tan Chong and Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 (folld)
2 *Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395 (folld)
3 *Munusamy v PP* [1987] 1 MLJ 492 (folld)

A 4 *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127; [1972] 2 QB 189; [1972] 2 WLR 800 (folld)
5 *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319 (refd)
6 *Webb v Hughes* (1870) LR 10 Eq 281 (refd)
7 *Stickney v Keeble & Anor* [1915] AC 386 (refd)
8 *Tilley v Thomas* (1867) LR 3 Ch App 61 (refd)
B 9 *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 (folld)
10 *Seth Maganmal & Anor v Darbarilal Chowdhry* AIR 1928 PC 39 (refd)
11 *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 C MLJ 33 (refd)

Legislation referred to
Evidence Act 1950 ss 92(c), 114(g)

D *Wong Kim Fatt* (*Lee Fei Fung* with him) (*Gulam & Wong*) for the plaintiffs.
Raja Aziz Addruse (*Upali Masacorale* and *Robert Lai Poh Fye* with him) (*Jackson & Masacorale*) for the defendants.

PS Gill J: The plaintiffs claim specific performance in respect of an E agreement for the sale of a piece of land known as Lot No 295 held under grant No 17259 situated in the Mukim of Tebrau, District of Johore Bahru measuring in area 1,000.5 acres or thereabout (hereinafter referred to as 'the said land') and damages for wrongful termination of the agreement.
By the said agreement dated 20 August 1984, Rumah Nanas, the second defendant company (hereinafter referred to as 'the second defendant') F agreed to sell the said land free from encumbrances and with vacant possession to the plaintiffs at a price of $47,939,958.
The plaintiffs as were required by cl 3.1 paid a sum of $4,793,995.80 which sum represented 10% of the purchase price by way of forfeitable deposit upon the execution of the said agreement. The balance of the G purchase price was to be paid within six months from the date of the execution of the said agreement under cl 3.2.
The agreement contained two other relevant clauses, namely cll 3.3 and 3.4 which read as follows:

3.3 In the event the purchaser is unable to complete the sale and purchase on or H before the completion date, then upon such written notice given by the purchaser to the vendor two (2) weeks prior to the completion date, the vendor will grant an extension of time of three (3) months to the purchaser to complete the sale.
3.4 In the event the purchaser is still unable to complete the sale and purchase within the extended period of three (3) months, then at the written request of the purchaser, the vendor shall grant a further period of three (3) months I to the purchaser to complete the purchase, subject that the purchaser shall pay to the vendor a sum of M$11,000 per day as payment of liquidated damages to be calculated on the balance purchase price so due and payable until date of actual payment.

Since the execution of the agreement, the plaintiffs requested a number of extensions in order to find means whereby the terms of the agreement could be concluded. The second defendant granted the plaintiffs these extensions. On 12 December 1988 the solicitors for the second defendant wrote to the plaintiffs informing them that their clients were terminating the said agreement forthwith on the ground that the plaintiffs were unable to complete the purchase of the said land. On 18 December 1988 the plaintiffs filed a caveat against the said land and on the 31 January 1989 the plaintiffs filed the present action. The defendants filed their defence on 10 October 1991.

The main issues for determination are:

(i) whether the defendants induced the plaintiffs to enter into the sale and purchase agreement on the strength of an undertaking to obtain a loan for the plaintiffs to enable the plaintiffs to complete the sale and purchase of the said land free of encumbrances and with vacant possession;
(ii) whether the second defendant agreed to enter into a joint venture scheme with the plaintiffs to develop the land should the plaintiffs be unable to obtain the loan;
(iii) whether the defendants acted in breach of the said oral undertaking;
(iv) whether the termination of the said agreement was lawful.

For the plaintiffs Mr Yap Chui Kui (PW1) gave evidence in court stating that he was the managing director of the plaintiffs' company, which company is a housing developer, having developed some 1,095 units of houses in Senai. In 1984 PW1 was looking for land with a view to developing it. At about that time he came to know of the land which is the subject matter of this suit and which was owned by the defendants. After making some enquiries PW1 managed to contact the first defendant through the help of a mutual friend by telephone. PW1 asked the first defendant whether he was intending to sell the land in question and the first defendant replied that he was prepared to do so. PW1 intimated to the first defendant that he was keen to purchase the land but his company had a paid-up capital of only $5m. The first defendant stated that PW1's company should use the $5m as a down payment and he promised that he and his company would obtain a loan from the National Bank of Brunei or another source to enable PW1 to pay the balance of the purchase price, and PW1 could use the land as security for the loan. PW1 was also told that there were no encumbrances on the said land. Should the plaintiffs be unable to secure a loan, the first defendant said that his company (the second defendant) would enter into a joint venture scheme with the plaintiffs. PW1 was further told by the first defendant to contact his solicitors Messrs AL Looi and his resident director in Johore Bahru, Encik Sohaimi, and to do so within a few days so as to allow the first defendant time to give them the necessary instructions.

A few days later PW1 did see Mr AL Looi, now deceased, regarding the purchase of the land. PW1 informed Mr Looi of what had transpired between him and the first defendant on the telephone. Mr AL Looi con-

A firmed that he had received instructions from the first defendant regarding the sale of the land. PW1 further enquired from Mr Looi whether the sale and purchase agreement should cover the oral undertaking by the first defendant with regard to the loan and the joint venture. Mr Looi told the plaintiffs that it was not necessary to include these terms in the said agreement as the first defendant was a big tycoon and the plaintiffs should trust him. Acting upon such assurance by Mr Looi the plaintiffs, in reliance on the undertaking given by the first defendant, entered into the sale and purchase agreement by paying $1m for the option to purchase the said land. PW1 signed the option on behalf of the plaintiffs M/s Plenitude Holdings Sdn Bhd on 9 July 1984, while Encik Sohaimi signed the option on behalf of the second defendant company. Under the terms of the option a further sum of $3,793,995.80 being payment towards the 10% deposit in regard to the purchase price had to be paid on or before 11 August 1984. The balance sum of $3,793,995.80 towards the 10% deposit, was paid by the plaintiffs to the second defendant on 20 August 1984 after the expiry of the option period. At no time did the second defendant raise the question of forfeiture of the initial amount of $1m paid towards the option.

The principal witness for the defence was DW1 Tan Sri Khoo Teck Puat who was the chairman of the board of directors of the second defendant. He stated that he was a director of 30 to 40 companies and he was not concerned with the day to day management of these companies, including the second defendant company. DW1 denied speaking to PW1 on the telephone prior to July 1984. He further denied giving an undertaking to PW1 that should the plaintiffs purchase the said land he would arrange the loan. He further denied that he agreed to the second defendant joining the plaintiffs in a joint venture scheme should the loan be not forthcoming. DW1, however, stated that he did sign the sale and purchase agreement and Encik Sohaimi signed it on behalf of the second defendant. DW1 stated that he was not involved in matters arising out of the sale and purchase agreement after it was signed. The person involved was the executive director Mrs Thean Bee Lian (DW2). DW1 however confirmed that Encik Sohaimi was the manager and director of the second defendant company until 1990 when he stopped working for the second defendant company.

In the light of the evidence before the court it is not disputed that an agreement was signed by the plaintiffs and the first and second defendants on 20 August 1984. It is also not disputed that an option was granted to the plaintiffs' representative, PW1, by the second defendant. For that to take place there must have been some form of communication between the parties. While PW1 had categorically stated that he and DW1 spoke on the telephone in regard to the terms of purchase, DW1 on the other hand made no mention whatsoever in his evidence of the circumstances that had led him and the second defendant to grant an option to PW1. In the absence of any cogent and reasonable explanation, I accept as probable that there was indeed communication between PW1 and DW1 prior to the granting of the option to PW1 to purchase the land. Apart from denying the fact that he spoke to PW1, DW1 clearly failed to throw any light whatsoever as to the circumstances that led to the granting of the option and the signing of the agreement.

The plaintiffs, a company with a paid-up capital of $5m of which there was 30% equity participation by Yayasan Pelajaran Johore, was unlikely to have agreed to the terms of the sale and purchase agreement unless the first defendant had unequivocally given an oral undertaking to secure a loan for the plaintiffs, or at the very least promised PW1 that the second defendant would participate in a joint venture with the plaintiffs if the loan was not forthcoming. It was well known that in 1984 the first defendant had a substantial control in the Bank of Brunei and was a very prominent figure in banking circles. It is therefore not unreasonable for this court to conclude that he was indeed in a position to agree to assist PW1 in obtaining a loan for the plaintiffs.

Counsel for the defendants argued that it was not the function of the first and second defendants to secure a loan for the plaintiffs. It may well be in normal circumstances but we are not speaking of an ordinary banker, but of a banker of some special standing and position who clearly had the necessary ability, perhaps authority to do it, had he chosen to do so. Moreover it was in the interest of the defendants for the plaintiffs to secure the loan, for in such event the plaintiffs could complete the purchase of the land at a price substantial enough to benefit the defendants.

It is perhaps appropriate to observe at this point that in giving his evidence DW1 seems to be evasive. I therefore entertain serious doubts as to the credibility of his evidence. He made no attempt to explain how he came to know that the plaintiffs were interested to purchase the said land and what made him give whatever instructions he had given to his solicitors pertaining to the sale of the said land.

One very glaring contradiction emerged in the course of cross-examination of DW1 by counsel for the plaintiffs. DW1 maintained that he did not give instructions to his solicitors Messrs AL Looi through Encik Sohaimi in respect of the sale and purchase of the land, but when confronted with the contents of an affidavit sworn by him on 9 February 1989 marked as P8, where he affirmed, '... my instructions pertaining to the sale of the land were communicated to my then lawyer AL Looi Esq through the Resident Director Encik Sohaimi', DW1 sought to explain that it was an error and that he was confused. Considering the standing of DW1 in the banking world and in view of the fact that his affidavit was affirmed in Sydney, Australia before a notary public, it is indeed a futile and totally unconvincing attempt on the part of DW1 to explain the contradictory statement.

Also under cross-examination DW1 was referred to a letter dated 2 June 1986 (at p 31 of the agreed bundle 'P2'). It was a letter written by the plaintiffs to their solicitors Messrs Lim & Hooi with reference to an earlier letter dated 27 May 1986 addressed to DW1 in connection with seeking DW1's assistance for a loan to enable the plaintiffs to complete the purchase of the said land. DW1 at first denied knowledge of the said letter, but when pressed under cross-examination, he admitted that he was aware of the contents of the letter. The evidence in fact shows that DW1 himself had referred to it in an affidavit affirmed by him dated 7 July 1989 (exh 'P9').

A It is therefore proved that on two different occasions DW1 had given contradictory statements and on both occasions he provided no reasonable or any credible explanation.

At the risk of repetition I would say that DW1 was an evasive and an unreliable witness. He even denied any knowledge of important letters referred to at pp 31, 98 and 100 of the agreed bundle 'P2'. I found it highly B improbable that DW1 had not been informed of the important developments that took place concerning this particular transaction. How could he, as he himself stated in his evidence to be 'involved in the formation of the policies and implementation of the policies of the Board', be unaware of such important development? More so in the light of DW2's testimony that C DW1 was the most influential person on the board, and a decision maker. Evidently DW1 could not be described merely as a rubber stamp; on the contrary he was a person who kept himself abreast with all important decisions in regard to the company, and evasiveness on the part of DW1 was clearly deliberate and in no way could it be described as an act of mere forgetfulness.

D On the evidence, both oral and on the contemporaneous documentary evidence, I can only conclude as a fact that the plaintiffs have proven on a balance of probabilities that DW1 had promised to secure a loan for the plaintiffs and that in the event that such a loan could not be secured he had given an undertaking to join the plaintiffs in a joint venture scheme to E develop the said land.

One of the main contentions of Raja Aziz, counsel for the defendants, was that even if the plaintiffs had proved the alleged representations, the position in law clearly is that those representations had no effect on the agreement of 20 August 1984 and are therefore consequently irrelevant by reason of the express provisions of cl 19.1 of the agreement which states F that the agreement:

> shall represent the *entire agreement by and between the parties* hereto, except as otherwise provided for herein and it *may not be changed except by written agreement duly executed by the parties hereto.*

G My understanding of the law is that the prohibition against the admissibility of oral evidence under s 92 of the Evidence Act 1950 ('the Act') would apply when all, as opposed to some only, of the terms of the contract are written into the agreement; when there is evidence that some terms are given orally and some in writing, oral evidence can be given to prove the terms agreed to orally.

H The purpose of adducing oral evidence clearly is not to contradict, vary, add to or substract from the terms of the said agreement but to prove the existence of a separate contractual provision as provided for under s 92(c) of the Act.

The primary purpose of proving the pre-contract statements in this case I was not to contradict, vary, add to or subtract from the terms of the agreement, but to prove the existence of a separate contractual provision. I therefore see no reason why such oral terms should not be admitted. This point was dealt with in the case of *Tan Chong and Sons Motor Co (Sdn) Bhd*

v Alan McKnight.[1] It was further argued by learned counsel for the defendants that even if the court were to accept the oral evidence, it amounted to a promise to lend money and as a general rule cannot be specifically enforced at the suit of either party. With respect to counsel for the defendants, the oral promise made by the first defendant was not in respect of a contract to lend money, but a promise to obtain a loan for completion of the purchase of the land and if the loan was not forthcoming to enter into a joint venture with the plaintiffs to develop the land.

It was further submitted by learned counsel for the defendants that PW1 did not disclose the identity of the mutual friend who had initially introduced him to the first defendant via the telephone. If counsel had felt that this point was of some importance to the defendants' case why did he not cross-examine PW1 as to the identity of the mutual friend? Counsel for the defendants also submitted that PW1 should have called Encik Mohamed Sam Sailan, a director of the plaintiffs as a witness to confirm the fact that PW1 had spoken to him about the undertaking given by the first defendant to PW1. Why on earth should PW1 call Encik Mohamed Sam Sailan who took no part in any of the negotiations between PW1 and the defendants? In what way would such evidence shed any fresh light on the events that took place prior to the execution of the sale and purchase agreement of the said land? The court was asked to draw an adverse inference against the plaintiffs for their failure to call the two witnesses. With respect this application of the law by counsel for the defendants is completely misconceived.

It is an established principle of law that before an adverse inference under s 114(g) of the Act can be drawn there must be (a) withholding or suppression of evidence and (b) non-production of an important and material document or witness. See *Synn Lee & Co Ltd v Bank of China*[2] and *Munusamy v PP*[3] (at p 494).

In the present case there is clearly no question here of an attempt by the plaintiffs either to withhold or to suppress evidence. There is therefore no justification whatsoever for drawing such an adverse inference under s 114(g) of the Act.

As stated earlier the agreement made certain provisions for extension of time to be given to the plaintiffs to enable them to comply with the provisions of the sale and purchase agreement. Counsel for the plaintiffs has submitted that in view of the many oral assurances and representations made by Encik Sohaimi, the resident director of the second defendant that the first and second defendants would not terminate the agreement, time was no longer the essence of the contract. Counsel also argued that there was waiver on the part of the second defendant.

After the expiry of the agreement on 20 August 1985, the plaintiffs were in fact given a series of extensions by the defendants. It may well be that time originally was of the essence of the contract as stated in cl 3.5 of the agreement as follows:

> In the event of the purchaser's failure, neglect and/or refusal to complete the purchase of the said land within the time stipulated above, the vendor shall be at

A liberty and be entitled to forfeit the sum of M$4,793,995.80 as agreed liquidated damages (as the parties have agreed and realize that otherwise damages cannot be determined) and thereafter this agreement shall be treated as null and void and of no legal effect whatsoever.

But time was no longer of the essence when, as manifested by the conduct B of the defendants, it was waived. The correspondence and dealings between the parties down to and including up to 12 December 1988 confirm this fact. Time in fact and in law was no longer the essence of the contract. Waiver has been defined in the case of *WJ Alan & Co Ltd v El Nasr Export & Import Co*[4] by Lord Denning where at p 140 of the same judgment his Lordship stated:

C

> The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v* D *Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527 at p 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter E insist on them: see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657; [1955] 1 WLR 761. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

F

See also *Kilmer v British Columbia Orchard Lands Ltd*[5] at p 322. It is significant to note that when at all material times the plaintiffs defaulted paying the balance of the purchase price the defendants made no attempt whatsoever to forfeit the deposit.

It was argued by counsel for the defendants that by a letter dated 26 May G 1986 (P2/98) the second defendant's solicitors wrote to the plaintiffs' solicitors that the second defendant had considered the agreement to have lapsed. This argument does not hold water, because on 31 March 1987 the second defendant's solicitors wrote to the plaintiffs' solicitors giving them 14 days' notice within which time to complete the terms of the agreement, H which period was also subsequently waived by the defendants. See also the letter dated 30 April 1980 (P2/101). From the extensive correspondence between the plaintiffs and the defendants it is abundantly clear that the parties had been negotiating for joint venture as alleged by the plaintiffs, or for a 'new purchase' as conceived by the second defendant. In actual fact, DW2 did state in her evidence that she gave instructions to her solicitors I AL Looi through Encik Sohaimi to write to the plaintiffs in regard to the matter. There is no doubt in my mind that such negotiations did take place between PW1 and Encik Sohaimi acting on behalf of the defendants. The

denial by the defendants does not lend support to their contention that there were no negotiations between them and the plaintiffs. See exh 'P2'. A

In fact, it is proven to my satisfaction that Encik Sohaimi as the resident director of the second defendant, had express and ostensible authority from both the defendants to act for them in the matter relating to this particular transaction. In this regard, the first defendant admitted that he was not suggesting that Encik Sohaimi was acting outside his scope of authority as a director of the company. B

What clearly emerges from the correspondence between the parties was that the plaintiffs were awaiting suitable response from the second defendant as to their confirmation on the joint venture (see pp 33 and 122 of P2 and other related proposals at pp 106, 108 and 109 of P2). C

Again at the risk of repetition I would say that since the plaintiffs were unable to raise a loan either on their own volition or by the default of the first defendant, time no longer constituted the essence of the contract, as evident from the negotiations that continued between the parties. If the defendants had considered time of the essence they ought to have given a reasonable notice of their intention to abandon the contract if the balance of the purchase price was not paid (see *Webb v Hughes*[6] and *Stickney v Keeble & Anor*[7]). The plaintiffs as can be seen from the evidence never abandoned the agreement expressly or impliedly. D

At the very least if after embarking upon negotiations with the plaintiffs, but still considering time was of the essence of the contract the defendants should have in that event at least given reasonable notice (see *Tilley v Thomas*[8]). E

Having found time was no longer of the essence, the notice of termination dated 12 December 1988 was not therefore a reasonable notice. In my mind the contract was never legally terminated and accordingly the plaintiffs were not in breach of the contract. F

I am also of the view that the failure of the second defendant to terminate the contract after a lapse of three and a half years is wholly inconsistent with their contention that time was of the essence of the contract. Indeed it was consistent with the plaintiffs' version that Encik Sohaimi gave assurances and made representations on behalf of the first and second defendants that the second defendant would not terminate the agreement and forfeit the deposit. G

In this respect the decision in the case of *Wong Kup Sing v Jeram Rubber Estates Ltd*[9] is relevant. The facts of the case were as follows:

> The plaintiff claimed specific performance of an agreement of sale of a rubber estate entered into between him and the defendants or in the alternative for damages or rescission of the contract. Under the agreement, time had been made the essence of the contract, but at the request of the plaintiff the defendants had consented to extension of time for completion on six separate occasions. Eventually the defendants through their solicitors wrote to the plaintiffs on 15 November 1967, insisting that the purchase be completed on the same day. As completion was not made on that day, they wrote to the plaintiff to say that the agreement was terminated. Subsequently the plaintiff offered to complete the contract but the defendants refused, taking the view that the contract was at an end. H I

A Raja Azlan Shah J (as he then was) held that:

> Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid. ... the notice of
B abandonment dated 15 November 1967 was not a reasonable notice ... the contract was never terminated ...

I would now turn to consider the adverse inference that could be drawn against the defendants. Counsel for the plaintiffs contended that Encik Sohaimi should have been called to give evidence on material issues on
C behalf of the defendants, namely:

(1) whether he advised PW1 that whenever the plaintiffs or PW1 wrote to the defendants their letters must be polite and humble and they should omit all references to the oral undertakings made by the defendants;
(2) whether Encik Sohaimi did promise PW1 on behalf of the defendants
D that the second defendant would not forfeit the 10% deposit in view of the oral undertakings given by the defendants.

It is quite apparent that Encik Sohaimi was no small cog in the second defendant company. He was referred to by DW1 as the second defendant's resident director in charge of land matters in Johore and he was also
E authorized to negotiate on behalf of the defendants. Evidently he had full knowledge of the negotiations between himself and PW1. For that reason he ought to be the most material witness in these proceedings to testify for the defendants.

The question is why did the defendants not call him as a witness? Granted that he had left the employment of the second defendant company
F in 1990. The defendants should at least inform the court that they had applied for a subpoena to secure Sohaimi's attendance or alternatively to adduce some evidence that they made sufficient efforts to locate Encik Sohaimi but were unable to do so.

The overwhelming evidence is that PW1 had been in contact with Encik Sohaimi who represented the second defendant from the very start. A series
G of meetings between PW1 and Encik Sohaimi, the resident director, had taken place and Sohaimi was the one who at all times advised PW1. It was Encik Sohaimi as a representative of the first defendant and a director of the second defendant company who arranged a meeting at the United Malayan Banking Corp in Kuala Lumpur on 7 October 1985 with PW1 and repre-
H sentatives of the bank. The defendants' denial that Encik Sohaimi had arranged the said meeting for the plaintiffs is absolutely unacceptable. Encik Sohaimi also advised PW1 in regard to the substance and tenor of his correspondence with the first defendant in regard to loan facilities. On the contrary I found it reasonable to accept as the truth PW1's testimony to the effect that when he pressed Encik Sohaimi regarding the promised loan, the
I latter informed him (PW1) that he would instruct the defendants' solicitors to write a letter to the plaintiffs to negotiate for new terms for the purchase of the said land. The fact is confirmed by a letter written on 26 May 1986 by the solicitors of the second defendant, Messrs AL Looi to the plaintiffs'

solicitors asking whether the plaintiffs would negotiate for the purchase of the land. The letter is at p 98 of P2. It states:

HSM/MS/11334/85 Without prejudice
LAL/wqy/R 469/84

26 May 1986

M/s Lim & Hooi,
3rd Floor,
UMNO Building,
Jalan Segget,
Johore Bahru

Dear Sirs,

Re: Grant 17259 for Lot 295 in Mukim of Tebrau
Agreement dated 20 August 1984

We refer to your client's above purchase.

The date fixed for completion had since lapsed. Please let us know whether your client desires to negotiate for the purchase of the land. If so, let us have terms of completion under the new purchase in order that we can revert to our client for their agreement and instructions.

Unless we hear from you within ten (10) days, we shall deem your clients do not desire to proceed to complete the purchase subject to the agreed interest as reserved to be payable. We shall upon instructions proceed to formally terminate the sale and purchase.

All rights of our client are reserved.

Yours faithfully
Sgd

cc
M/s Rumah Nanas Rubber Estate Sdn Bhd
Room 3, 4th Floor, Wisma Peladang,
Jalan Selat Tebrau,
Johore Bahru.

On 29 May 1986 the plaintiffs wrote to the first defendant regarding the loan (see p 30 of P2). There was no response from the first defendant.

Regardless, the parties continued to negotiate. However on 31 March 1987 the second defendant's solicitors issued a notice to the plaintiffs giving them 14 days' notice. PW1 was aggrieved as he felt that the first defendant had failed to honour his promise to obtain a loan. Again, when he confronted Encik Sohaimi he was informed that the first defendant was having difficulties on account of the National Bank of Brunei scandal (see pp 44–47 of P2) and that in the circumstances the defendants would give the plaintiffs more time. At that period the National Bank of Brunei entered a private caveat on 24 September 1986 against the said land followed by a lien holder's caveat on 4 December 1987.

It is in evidence that after further negotiations between PW1 and Encik Sohaimi they finally agreed on a compromised arrangement. On 13 May 1987 the plaintiffs wrote a letter to the defendants' solicitors informing them of the arrangement (see p 33 of P2). A copy was sent to Encik Sohaimi and the second defendant. The letter states:

Plenitude Holdings Sdn Bhd
3–B, Batu 2, Jalan Scudai, 80200 Johore Bahru,
Johore, West Malaysia,
Tel: 07–220816, Telex: BOSKYM MA00044.

Your Ref: LAL/wqy/R 469/84.

13 May 1987

M/s AL Looi,
Advocates & Solicitors,
Room 401–403, Bangunan OCBC,
Jalan Ibrahim,
Johore Bahru.

Dear Sirs,

Re: Sale of Grant 17259 for Lot 295 in the Mukim of Tebrau

With reference to the above matter, we are discussing with Encik Sohaimi A Jalil at length and come to a compromising arrangement.

Any further development, we will keep you inform.

Thank you.

Yours faithfully,
Sgd
YB Mohamed Sam bin Haji Sailan
BSc (Honours), PIS, BSI, AMN,
Chairman and MP for Muar.

cc
(1) M/s Rumah Nanas Rubber Estate Sdn Bhd
(2) M/s Lim & Hooi (Ref: HSH/MS/11334/84)
(3) En Sohaimi A Jalil

It is also in evidence that during all these crucial negotiations between PW1 and Sohaimi, important decisions affecting the outcome of the contract were being taken.

In the light of what I have stated earlier the failure of the defendants to call Sohaimi, would make the evidence of PW1 uncontroverted on crucial issues. Sohaimi was without doubt the principal person involved in all the transactions with PW1. DW1 himself stated in paras 7 and 8 of his affidavit (P8) affirmed on 9 February 1989 as follows:

7 All my instructions pertaining to the sale of the said property was communicated to my then lawyer AL Looi Esq through the resident director of the said company Encik Sohaimi bin Abdul Jalil.

8 The said company accommodated the extensions requested by the caveators on a 'without prejudice' basis to enable the caveators to get a bank loan or enter into a joint venture partnership with some other parties to complete the purchase. The resident director of the said company will be in a better position to enlighten this honourable court on what really transpired as he was the one who negotiated with the caveators while taking instructions from the said company culminating in the termination of the said agreement by letter dated 12 December 1988.

Sohaimi clearly is the only person who could give the court a firsthand account of all the negotiations between the defendants and the plaintiffs. He seems to be the only one who could deny on oath the allegations made by the plaintiffs. Refer to the cases of *Seth Maganmal & Anor v Darbarilal Chowdhry*[10] and *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd.*[11]

On weighing the evidence very carefully this court would hold that an adverse inference ought to be drawn against the defendants and the court does, in that had their resident director Encik Sohaimi been called to give evidence, his evidence would have been unfavourable to the defendants.

Apart from DW1, the other witness for the defendants was DW2 Thean Bee Lean. She stated that she was the executive director of the second defendant company in 1984. But what the court gathers from her evidence is that she was at all material times residing in Australia and only used to return to Singapore two or three times a year apart from her attendance at board meetings in Singapore once a year. She depended on Encik Sohaimi to give her information pertaining to the affairs of the second defendant. Although she claimed that neither she nor Encik Sohaimi had any power to grant extensions to the plaintiffs, nevertheless a series of extensions were given either expressly or impliedly to the plaintiffs by the defendants.

She admitted that apart from what was conveyed to her by Encik Sohaimi, she had no personal knowledge as to what transpired between Encik Sohaimi acting on behalf of the second defendant company and PW1. DW2 also admitted that Encik Sohaimi was authorized to negotiate with PW1.

DW2 was not in a position to testify whether DW1 had given any oral promise to PW1 in regard to the loan or joint venture as she was not present when the promise was made.

On the evidence viewed in totality I am satisfied that the plaintiffs have made out a case to merit an order for specific performance. A court of equity enforces specific performance of a contract affecting land because it acts upon the equities caused by the acts of the parties in the execution of the contract and not upon the contract itself.

The defendants by their indulgence in granting the plaintiffs a series of extensions to complete the terms of the agreement have lulled the plaintiffs into a false sense of security and have given the plaintiffs reason to believe that they would be given a reasonable time within which to complete the contract. It would be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce their strict legal rights against the plaintiffs after they have led the plaintiffs to believe that they had no intention to enforce such rights.

The plaintiffs are accordingly entitled to an order for specific performance of the sale and purchase agreement dated 20 August 1984, with damages to be assessed and paid by the second defendant to the plaintiffs for wrongful termination of the agreement and by both defendants for breaches of their undertakings with costs.

Within three weeks from the date of this order, the second defendant shall deposit the issue document of title of the land, ie Grant 17259 for Lot 295, District of Johore Bahru, and the relevant current quit rent and assessment receipts with the senior assistant registrar of this court.

From the date of such deposit, the plaintiffs shall, within six months, or in the event of an appeal such extended period as the appellate court may allow, pay the balance of the purchase price in the sum of $43,145,962.20 to the senior assistant registrar of this court who shall sign the transfer of the said land and the adjudication form and other relevant documents on behalf of the second defendant to convey a good title to the plaintiffs free from all encumbrances and shall forthwith deliver the said transfer, the said Grant 17259 and the said documents to the solicitors for the plaintiffs. The second defendant shall forthwith deliver vacant possession of the land to the plaintiffs on payment of the balance as aforesaid.

The Registrar of Titles, Johore, and any other proper registering authority are hereby directed and ordered to register the said transfer forthwith in favour of the plaintiffs, Plenitude Holdings Sdn Bhd. as proprietors, free of all caveats, liens, charges, prohibitory orders, and other encumbrances.

The costs of this action are to be paid by both the defendants.

Plaintiffs' claims allowed.

Reported by Zarinah Marican